



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaints by Alfred Abouchar dated July 6, 1989, alleging discrimination in employment on the basis of race, place of origin and ethnic origin by the Metropolitan Toronto School Board and Le Conseil des Ecoles Francaises de la Communaute Urbaine de Toronto

B E T W E E N :

Alfred Abouchar

Complainant

- and -

Metropolitan Toronto School Board

Conseil des Ecoles Francaises de la
Communaute Urbaine de Toronto

Respondents

INTERIM DECISION

Adjudicator : Michel Picher

Date : June 8, 1995

Board File No: 93-0067

Decision No : 95-026-I

Board of Inquiry (*Human Rights Code*)
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IN A MATTER HEARD BEFORE THE
BOARDS OF INQUIRY

REGARDING:

ONTARIO HUMAN RIGHTS COMMISSION AND
ALFRED ABOUCHAR
(the "Complainant")

- and -

METROPOLITAN TORONTO SCHOOL BOARD
AND LE CONSEIL DES ÉCOLES FRANÇAISES
DE LA COMMUNAUTÉ URBAINE DE TORONTO
(the "Respondents")

CHAIRPERSON:

Michel G. Picher

APPEARING FOR THE
MINISTRY OF EDUCATION:

Michael Fleishman
Catherine Dennis

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Counsel

APPEARING FOR THE
METROPOLITAN TORONTO
SCHOOL BOARD:

Brian Kelsey

-

Counsel

APPEARING FOR THE
COMMISSION:

Catherine Osborne

-

Counsel

APPEARING FOR CEF CUT:

Richard Evenson and
Drew Atkins

-

Counsel

APPEARING FOR
ANDRE LALONDE:

Brian Gover and
Christopher Wirth

-

Counsel

APPEARING FOR
THE COMPLAINANT:

A. Abouchar

Hearing in this matter were held in Toronto on May 30 & 31, 1995.

INTERIM DECISION

This interim decision is issued to record the reasons for the decision of the Board of Inquiry in respect of a preliminary motion brought by the Ontario Human Rights Commission to add the Ontario Ministry of Education and Training and Mr. André Lalonde as respondents in these two complaints. The first complaint, #60-448M, against the Metropolitan Toronto School Board, relates to a job competition held in June of 1988. The second complaint, against Le Conseil des écoles françaises de la communauté urbaine de Toronto (hereinafter the CEFCUT) #60-449M, relates to a re-run of the same competition held in December of 1988. The complaints, filed originally on July 6, 1989, and resubmitted in amended form on February 8, 1995, on behalf of the Complainant, Mr. Alfred Abouchar, allege that the denial of the Complainant's application in respect of both competitions was for reasons of discrimination on the grounds of Mr. Abouchar's place of origin, race, ethnic origin and involvement with the Francophone Multicultural Community, or as a reprisal for an earlier human rights complaint, contrary to Sections 4(1)(2), 7, 8 10 and 11 of the Ontario Human Rights Code, 1981. The Commission's request to now add the Ministry and Mr. Lalonde as parties respondent is made under the terms of the former Section 38 of the Ontario Human Rights Code, 1981, R.S.O. 1980, c. 53, (now section 39 of the Code, R.S.O. 1990, C.H.19). Section 38 of the 1981 Code reads, in part, as follows:

- 38. (2) The parties to a proceeding before a board of inquiry are,
 - (a) the Commission, which shall have the carriage of the complaint;

- (b) the complainant;
 - (c) any person who the Commission alleges has infringed the right;
 - (d) any person appearing to the board of inquiry to have infringed the right;
 - (e) where the complaint is of alleged conduct constituting harassment under subsection 2(2) or subsection 4(2) or of alleged conduct under section 6, any person who, in the opinion of the board, knew or was in possession of facts from which he or she ought reasonably to have known of the conduct and who had authority to penalize or prevent the conduct.
- (3) A party may be added by the board of inquiry under clause (2)(d) or clause (2)(e) at any stage of the proceeding upon such terms as the board considers proper.

For the purposes of the motion brought by the Commission to add the two parties respondent, certain facts are not contested. In July of 1986, the Legislature passed Bill 75, An Act to Amend the Education Act and the Municipality of Metropolitan Toronto Act, S.O. 1986 c. 29, which provided for the establishment of French-language school boards in Ontario. Section 13(2) of Bill 75 amended the Municipality of Metropolitan Toronto Act

by adding to it section 120b establishing a French-language board of education (referred to as a "Council") for Metropolitan Toronto, to be known as the Le Conseil des écoles françaises de la communauté urbaine de Toronto (CEFCUT), with the new Council to come into existence effective December 1, 1988.

In 1987, the Ministry of Education established a Task Force to oversee the coming into being of the CEFCUT. Mr. André Lalonde, who was then an employee of the Ministry, was named as a representative of the Ministry to the Task Force which, it does not appear disputed, was also comprised of representatives from boards of education within Metropolitan Toronto and certain French-language rate payer or parent groups, as well as teacher and principal representatives.

It is also not disputed that, effective August 4, 1987, Mr. Lalonde was seconded from the Ministry to the Metro Toronto School Board in a position which came to bear the title "Superintendent of French-language Programs". The secondment was to last until July 31, 1989. It is common ground that the Metro Toronto School Board assumed the payment of Mr. Lalonde's salary and benefits for the period in question, and that it provided him with office, secretarial and administrative facilities for the work he was to perform.

Mr. Lalonde held the position of Superintendent of French-language Programs for the Metropolitan Toronto School Board, and was also Coordinator of the Task Force, when the competition of June, 1988 for the position of Assistant Superintendent of Programs, the

subject of these complaints, was held. While still on secondment from the Ministry, Mr. Lalonde came to hold the position of Interim Director of the CEF CUT at its inception, effective December 1, 1988. It is not clear on the material before the Board of Inquiry whether he commenced to be paid by the CEF CUT effective December 1, 1988 or in January of 1989. However, for the purposes of the motion of the Commission, it is not disputed before me that Mr. Lalonde was still on secondment from the Ministry of Education and Training, and was paid either by the Metropolitan Toronto School Board or the CEF CUT for the period of December 1988, when he participated in the second selection competition to fill the position of Assistant Superintendent of Programs, which gave rise to the second complaint filed by Mr. Abouchar. It also appears to be common ground that sometime subsequently, apparently on June 30, 1989, Mr. Lalonde resigned his position with the Ministry to become the Director of Education of the CEF CUT.

The original complaints filed by Mr. Abouchar against the Metropolitan Toronto School Board and the CEF CUT are dated July 6, 1989. From that date until February 8, 1995, the School Board and the CEF CUT were the only respondents to the complaints. Counsel for the Human Rights Commission candidly admits that the Commission now seeks to add the Ministry of Education and Training and Mr. Lalonde as respondents by reason of a position apparently first articulated by counsel for the Metro Toronto School Board in or about February of 1995. It would appear that counsel then indicated that the School Board's position would be that the School Board should not be accountable for the actions of Mr. Lalonde during the period of his secondment or, alternatively, that the Ministry

should be equally accountable. According to counsel for the Commission, faced with the possibility that either or both of the corporate or institutional employers of Mr. Lalonde - the School Board and the CEFCUT - might be found not to be liable for his actions, the Commission decided to move to add Mr. Lalonde in his personal capacity, as well as the Ministry of Education and Training, as respondents to both complaints.

Counsel for the Ministry submits that the material presently before the Board of Inquiry discloses no cause of complaint as against the Ministry. On the basis of the affidavit of Ms. Mariette Carrier-Fraser, Assistant Deputy Minister, he stresses that the Ministry had "... no involvement in the supervision of Lalonde or the assignment of his duties at the Metro Board during the period of his secondment". Specifically, the Ministry submits that it was not involved at any stage in the process of selection for the position of Assistant Superintendent of Programs for the CEFCUT, which was the position denied to Mr. Abouchar.

Counsel for Mr. Lalonde strenuously opposes his being added as a respondent in his personal capacity at this late date. He stresses that the complaints were filed more than six years prior to February of 1995, when the Commission first indicated its intention to add Mr. Lalonde as a party. Counsel emphasizes that the involvement of Mr. Lalonde in the events giving rise to the complaints was long and well known to the Commission, and that adding him as a respondent after such an extensive delay is unfair and prejudicial. Counsel for Mr. Lalonde further joins in the argument made, in part, by counsel for the Ministry of

Education and Training, that the Commission is without authority to add Mr. Lalonde as a party, and the Board of Inquiry is without jurisdiction to hear any complaint against him, as the Commission did not involve him as a respondent in any conciliation efforts. Counsel submits that participation in conciliation is a condition precedent to the advancing of a complaint to a Board of Inquiry as against any individual and, in that regard, cites the decision of the majority of the Board of Inquiry in *Findlay v Mike's Smoke and Gifts* (1993), 21 C.H.R.R. D/19.

Further, with respect to the hardship which can be visited upon an individual who is made a respondent in human rights proceedings, which can be burdensome in terms of time and expense, counsel for Mr. Lalonde refers the Board to the comments of the Board of Inquiry made by Chair Knopf in *Man S. Makkar v. City of Scarborough*, 8 C.H.R.R. D/673. In particular, he cites the following observation:

However, this Board of Inquiry feels compelled to comment that because of the tremendous impact that can be caused upon a person as a result of an allegation of a violation of the Human Rights Code, the Commission should exercise great caution when it decides to name an individual as a party to proceedings. Individuals should not be named unless there is a real need to include them as parties and unless the Commission has a real intention to proceed against them. This is especially so where there is a corporate respondent and no practical need to name individuals in order to process the claim.

Based on the material presently before me, and the facts as they have been agreed for the purposes of the present motion, I am satisfied that it is not appropriate, at this time, to add the Ministry of Education and Training or Mr. Lalonde as parties respondent to these complaints. For present purposes, notwithstanding separate motions brought by the Ministry and Mr. Lalonde, the issue of adding them as parties can be entirely disposed of on the basis of the motion of the Commission to add the Ministry and Mr. Lalonde as respondents, and I need not deal with the substance of the motions made by counsel for the Ministry and counsel for Mr. Lalonde, respectively.

On the facts, as agreed before me, Mr. Lalonde was, at all material times, seconded to either the Metropolitan Toronto School Board or the CEF CUT from his original position with the Ministry of Education and Training. It is not denied that the Ministry was instrumental in setting up the Task Force of which Mr. Lalonde became a part, initially as a Ministry representative and, subsequently, as a representative of the Metropolitan Toronto School Board. However, the record is devoid of any specific allegation to the effect that the actions of Mr. Lalonde in his capacity of Superintendent of French-language Programs for the School Board, or as Interim Director of the CEF CUT, were controlled or influenced by the Ministry of Education and Training. At most, the record including the cross examination of Ms. Carrier-Fraser, would indicate that the activities of the Task Force as well as the Metropolitan Toronto School Board and the CEF CUT were followed or overseen in a very general sense by the Ministry of Education, in a manner consistent with the overall supervision which the Ministry exercises over boards of education in the province, generally.

On the material before me, however, there is no basis on which it could be found, at this time, that Mr. Lalonde was other than an agent or servant of either the Metropolitan Toronto School Board or the CEF CUT, insofar as his activities in relation to the two job competitions of June, 1988 and December, 1988 are concerned.

Parties should not be added as respondents to a complaint, particularly after a delay of some six years, absent good and compelling reason to do so. The Board of Inquiry readily understands the concerns of the Commission that the complaints, if successful, should attach to a party or parties who can be held accountable, both from the standpoint of responsibility and remedial redress, for any violation of the complainant's rights. In the instant case, the allegations before the Board would suggest, on their face, that at all material times Mr. Lalonde was the employee or agent of one or other of the Metropolitan Toronto School Board or the CEF CUT. Significantly, there is no specific claim or assertion before the Board of Inquiry which would allege any action, directive or involvement, direct or indirect, on the part of the Ministry in the job competition of June, 1988 conducted under the auspices of the Metropolitan Toronto School Board, or the job competition of December, 1988 conducted under the auspices of the CEF CUT, beyond the bare assertion that Mr. Lalonde was seconded from the Ministry and that the Ministry was originally involved in establishing the Task Force under Bill 75 and generally followed its progress. The agreed facts would support, at this time, the more probable conclusion that the Metropolitan Toronto Board of Education was in the role of a surrogate or caretaker Board of Education for the purposes of establishing the CEF CUT as one of its constituent Boards, at least from


the time of Mr. Lalonde's secondment until December 1, 1988. Thereafter, it appears, the CEF CUT was in place, with Mr. Lalonde as its Interim Director. On that basis, the Board of Inquiry is satisfied that it would be premature, at this time, to add the Ministry of Education and Training as a party respondent. Further, given the passage of some six years and the apparent involvement of two institutional respondents within which Mr. Lalonde functioned at all times material to the complaints, having regard to the concerns properly expressed in the Makkar decision, the Board is not of the view that Mr. Lalonde should be added as a respondent in his personal capacity at this late hour.

None of the foregoing should be taken as concluding that it might not, at some later stage of the proceedings, be appropriate to add the Ministry, Mr. Lalonde or any other person as a party respondent, pursuant to the discretion of the Board of Inquiry as contemplated under section 38(3) of the Ontario Human Rights Code, 1981 (now Section 39(3)). If, during the course of the hearing, compelling evidence should be adduced which would point to a justification for adding the Ministry, Mr. Lalonde or anyone else as a party, that issue may become ripe for determination, and may then be spoken to. However, in the Board's view, the amendment of the response filed by the Metropolitan Toronto School Board, effective February 17, 1995, to assert, among other things, that "Mr. Lalonde was not at any time employed by the School Board." is, of itself, at this time an insufficient basis to impose upon the Ministry and Mr. Lalonde the not inconsiderable burden of being added as respondents to the complaints. It remains, of course, open to the School Board to adduce evidence to establish that Mr. Lalonde was never its employee or that, at all material times,

he was the employee of the Ministry. In light of the agreed facts, however, respecting the secondment of Mr. Lalonde, absent any evidentiary basis whatsoever, for the reasons related above, it is now premature to add the Ministry or Mr. Lalonde, in his personal capacity, as respondents.

Finally, in light of the suggestion of counsel for the Commission, to protect against any unfairness should parties later be added, the Board of Inquiry directs that the proceedings on the merits of the complaints shall be tape recorded, solely for the purpose of making the recorded proceedings available to any party that might subsequently be added. Further, it is open to the Ministry of Education and Training, and Mr. Lalonde, to maintain a presence in these proceedings on the basis of a watching brief, should they choose to do so.

DATED at Toronto this 8th day of June, 1995.



Michel G. Picher - Chair